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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

HENRY SCHWEICHLER,

Plaintiff and Appellant,

v.

POWAY UNIFIED SCHOOL DISTRICT et  
al.,

Defendants and Respondents.

D043742

(Super. Ct. No. GIC 804028)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn and Joan M. Lewis, Judges. Affirmed.

Plaintiff Henry Schweichler, a high school student, was injured during wrestling practice. He sued defendants Poway Unified School District (District) and Brandon Thompson, the assistant wrestling coach, for negligence. The trial court granted defendants' motion for summary judgment, finding the action barred by the doctrine of primary assumption of the risk. Schweichler appeals.

## BACKGROUND

Schweichler's complaint alleged that in October 2002 he was a senior at Rancho Bernardo High School and was participating in the wrestling program. During a practice session, Thompson demonstrated a wrestling move with Schweichler as the subject. Schweichler alleged Thompson incorrectly positioned him for the move and then incorrectly performed it on him. The result was a severe injury to Schweichler's ankle. The complaint alleged District was negligent in hiring Thompson.

Defendants answered the complaint, alleging affirmative defenses, including primary assumption of the risk.

Defendants moved for summary judgment, arguing that by participating in the wrestling program Schweichler had assumed the risk of injury inherent in the activity and was barred from recovery. Schweichler opposed the motion, arguing Thompson's conduct was reckless and outside the scope of the risk Schweichler had assumed.

The trial court granted defendants' summary judgment motion, concluding that Schweichler's action was barred by his assumption of the risk inherent in wrestling.

## DISCUSSION

Schweichler argues the trial court erred in finding his action barred by the doctrine of primary assumption of the risk. He argues the trial court erred in excluding expert testimony from head wrestling coach Tom Kline and team captain Andrew D'Silva that Thompson's conduct was reckless. Finally, Schweichler contends District was on notice of Thompson's reckless conduct and that Kline's testimony that Thompson's conduct was reckless was effectively an admission of such by District.

"A defendant's motion for summary judgment should be granted if no triable issue exists as to any material fact and the defendant is entitled to a judgment as a matter of law. [Citation.] The burden of persuasion remains with the party moving for summary judgment. [Citation.] When the defendant moves for summary judgment, in those circumstances in which the plaintiff would have the burden of proof by a preponderance of the evidence, the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence.' [Citation.] We review the record and the determination of the trial court de novo. [Citation.]" (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003.)

*A. Primary Assumption of the Risk*

Schweichler argues the trial court erred in finding his action barred by the concept of primary assumption of the risk.

1. Law

Generally, each person has a duty to use ordinary care and is liable for injuries caused by a failure to exercise reasonable care under the circumstances. (*Kahn v. East Side Union High School Dist.*, *supra*, 31 Cal.4th at p. 1003.) However, in the context of active sports, this concept of duty is limited by the assumption of the risk doctrine. When a sport is inherently dangerous, imposition of the usual concepts of duty could alter the nature of the activity or inhibit vigorous participation. To avoid this result the primary

assumption of the risk doctrine holds that participants in such activities have no duty to protect one another from the risks inherent in the activity. However, the participants generally have a duty not to increase the risk of harm beyond that inherent in the sport. (*Id.* at pp. 1003-1004.)

The primary assumption of the risk doctrine also applies to coaching in those activities. In order to support a cause of action against a coach, it must be proved he or she acted with intent to cause the student's injury or acted "recklessly in the sense that the [coach's] conduct was 'totally outside the range of the ordinary activity' [citation] involved in teaching or coaching the sport." (*Kahn v. East Side Union High School Dist.*, *supra*, 31 Cal.4th at p. 1011; *Bushnell v. Japanese-American Religious & Cultural Center* (1996) 43 Cal.App.4th 525, 531-534.)

Determining whether the primary assumption of risk doctrine applies is a legal issue decided by the court. (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1217.)

## 2. Analysis

There is no claim Thompson intentionally injured Schweichler. The injury occurred when Thompson demonstrated a wrestling move on Schweichler that Schweichler was doing incorrectly. Schweichler claims the move was done too quickly. Contrary to Schweichler's argument, the demonstration of a technique using a student as part of the demonstration is an ordinary activity in the teaching of a sport. (See, e.g., *Lilley v. Elk Grove Unified School Dist.* (1998) 68 Cal.App.4th 939, 941-944; *Bushnell v. Japanese-American Religious & Cultural Center*, *supra*, 43 Cal.App.4th at pp. 529, 531-

535.) While it might be argued Thompson did not use ordinary care, there is no basis for finding he acted recklessly.

*B. Expert Opinion*

Schweichler argues the trial court erred in excluding the opinion testimony of head wrestling coach Kline and wrestling team captain D'Silva that Thompson acted recklessly in the demonstration that resulted in Schweichler's injury. Schweichler argues that contrary to the ruling of the trial court, such testimony was not inadmissible legal opinion.

Schweichler notes deposition testimony from Kline, indicating he investigated the incident. Kline did not see the demonstration that resulted in Schweichler's injury. Schweichler testified in a conclusory manner that he believed Thompson's conduct was reckless but did not know how to define the word reckless. Kline was asked what Thompson could have done to avoid the injury. Essentially, Kline stated the demonstration could have been done more carefully and in a way that did not injure a participant. Counsel asked if the demonstration could have been done using a dummy. Kline said that it could. Kline was then asked by Schweichler's counsel: "So, if he wanted to be reckless and, using your term, with gusto, he should have used the dummy rather than using Henry as a dummy. Is that what you are saying?" When Kline said "[c]orrect," counsel replied: "And, in that regard, he was reckless?" Kline agreed.

Courts ordinarily do not consider expert opinion that amounts to a conclusion of law. Expert testimony is useful, however, in revealing customary practices in esoteric areas to help courts weigh whether the inherent risk of an activity was increased by the

defendant's conduct. (*Kahn v. East Side Union High School Dist.*, *supra*, 31 Cal.4th at p. 1017.)

Kline was not qualified to give a legal opinion concerning recklessness. Indeed, Kline stated he was not sure how the word reckless was defined in this context. In any event, as we understand Kline's testimony, he was saying nothing more than the demonstration should have been conducted with greater care and that the demonstration could have been performed on a dummy, but there was no requirement that it be performed on a dummy. For this reason neither was his testimony an admission by District concerning recklessness.

D'Silva in a conclusory manner stated his opinion that Thompson's demonstration was reckless. D'Silva also testified there were dummies available for the demonstration of wrestling moves. He testified that in his opinion in order for Schweichler to learn the move, Thompson should have demonstrated it more slowly.

As with Kline, D'Silva's opinion concerning legal recklessness was inadmissible and his testimony even if credited did not show that Thompson's behavior was totally outside the range of the ordinary activity involved in coaching a sport.

The judgment is affirmed.

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BENKE, Acting P. J.

I CONCUR:

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McDONALD, J.

I concur in the result.

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HUFFMAN, J.